IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1379 OF 2007
IN
SUIT NO.4849 OF 1998

Hazel Mercantile Pvt Ltd. ...Plaintiffs

Versus

B.P.Chemcials Trading Ltd & Anr. ...Defendants

Shri Vivek Kantawala i/by Kantawala & Co for the Plaintiffs.

Ms S.Priya for the Defendant No.1 in support of Notice of Motion.

CORAM : ABHAY S.OKA, J.
DATED : AUGUST 02, 2007.

P.C.:

1. The submissions of the learned counsel appearing for the parties were heard on the last date and today the Notice of Motion is kept for dictation of order.

2. The first Defendant has taken out this Notice of Motion invoking section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act).

3. The Plaintiffs have filed the suit for recovery of sum of rupees seven crore sixty lakhs against the Defendants. According to the case of the Plaintiffs, there was a contract entered into between the Plaintiffs

and the first Defendants on 03rd August, 1998. The first Defendant entered into the said contract and the second Defendants are stated to be the agents of the first Defendant. Under the contract the first Defendant agreed to supply certain goods to the Plaintiff for consideration of US $ 3l75 per metric tonne on the terms and conditions set out in the contract. Detailed averments made in the plaint are not relevant for deciding the Notice of Motion. The case made out by the Plaintiffs is that the first Defendants committed default in complying with their obligations under the said contract. According to the case of the Plaintiffs, the delivery of the said goods was to be made by the vessel m.v.POTI at the port of Kandla and or on 16th September, 1998 but the vessel arrived at Kandla on 29th September, 1998. It is alleged that the third parties were pressuring the Plaintiffs for delivery of the said goods. According to the Plaintiffs they had entered into contracts with the third parties on the basis that the said goods will be available for delivery to the said third parties on or about 16th September, 1998. The sum of rupees seven crores sixty lakhs is paid by the Plaintiffs as damages the particulars which are incorporated in Exhibit ‘L’.

4. The learned counsel appearing for the first

Defendant in support of the Notice of Motion invited my attention to the averments made in the affidavit in support of the Notice of Motion. She invited my attention to the document annexed as Exhibit 'A' to the said affidavit in support which is a copy of fax message dated 28th July, 1998 send by the Plaintiffs to the second Defendants. She invited my attention to the arbitration clause in the said fax message. She submitted that the said fax message dated 28th July, 1998 constitutes the only agreement for sale between the Plaintiffs and the first Defendants which provides for referring the disputes arising under the agreement to arbitration in London, if necessary. She pointed out that though the Plaintiffs had referred to and relied upon the alleged agreement dated 03rd August, 1998 a copy of the same has not been annexed to the plaint. She submitted that the first Defendants are not aware of any agreement dated 03rd August, 1998 between the parties. She submitted that in view of the arbitration clause in the agreement dated 28th July, 1998 and in view of the willingness shown by the first Defendants to resolve the matter by arbitration, this Court will have to invoke section 8 of the said Act and direct the Plaintiffs to adopt appropriate arbitration proceedings as provided in agreement dated 28th July, 1998.

5. In reply, the learned counsel appearing for the Plaintiff submitted that the suit is not based on the alleged agreement dated 28th July, 1998 and the same is based on the contract dated 03rd August, 1998 which does not contain any arbitration clause. He submitted that the first Defendants had taken out a Notice of Motion No.1705 of 1999 for more or less identical relief which was permitted to be withdrawn by this Court by order dated 27th February, 2001. He submitted that the present Notice of Motion has been belatedly taken out by the first Defendants only after an order was passed by the learned Prothonotary and Senior Master on 09th March, 2007 of transferring the suit to the list of "Undefended Suits for Exparte Decree". He pointed out that the Notice of Motion has been filed on 12th April, 2007. He submitted that none of the ingredients of section 8 of the said Act are satisfied. By way of rejoinder, the learned counsel for the first Defendants submitted that there was no prayer made in the earlier Notice of Motion in terms of section 8 of the said Act and the prayer was only for stay of the suit. She submitted that express liberty was granted by this Court to take out a fresh Notice of Motion.

6. I have carefully considered the submissions made by the learned counsel appearing for the parties. The

first condition for applicability of section 8 of the said Act is that an action must be brought in a matter which is subject of an arbitration agreement. The further condition is that the application must be made by a party not later than when submitting the first statement on the substance of the dispute. Thirdly, the Application has to be accompanied by the original arbitration agreement or a duly certified copy thereof.

7. The averments made in the plaint show that reliance has been placed on a contract arrived at between the Plaintiffs and the first Defendants on 03rd August, 1998. The first Defendants have relied upon fax message dated 28th July, 1998 addressed by the Plaintiffs to the second Defendants. In the plaint there is not even a reference to the said communication dated 28th July, 1998 allegedly addressed by the Plaintiff to the second Defendants. In the fax message which is annexed to the Plaint which is sent by the Plaintiffs to the first Defendants, a reference has been made to sale confirmation reference No.1004903 dated 03rd August, 1998 and Deal No.0000004813. In the affidavit in support, the first Defendants have relied upon a fax message dated 28th July, 1998. In the plaint, as stated above, there is no reference to the said fax message. The fax message on which reliance is

placed by the first Defendants contains following arbitration clause:

. "Arbitration; in London, if necessary."

8. On plain reading of the plaint, the cause of action for filing the suit is based on the breach of contract dated 03rd August, 1998 relied upon by the Plaintiffs. According to the case of the Plaintiffs, the terms and conditions of the contract between the parties were arrived at on 03rd August, 1998. A grievance has been made by the first Defendants that the Plaintiffs have not produced a copy of the alleged contract dated 03rd August, 1998. The first Defendants are not relying upon the contract dated 03rd August, 1998. They are relying upon contract dated 28th July, 1998 which is not the subject matter of the suit. It cannot be stated that there is an arbitration clause in the alleged contract arrived at between the parties on 03rd August, 1998. The suit is for damages on account of breach of contract dated 03rd August, 1998 and the Plaintiffs have not alleged breach of any contract executed on 28th July, 1998. Therefore, the claim in the suit or cause of action for filing the suit cannot be said to be a subject matter of the agreement dated 28th July, 1998 set up by the first Defendants.

Therefore, section 8 of the said Act will have no application.

9. As regards the submission made on Notice of Motion No.1705 of 1999 is concerned, it is true that in the said Motion the first Defendants relied upon the same agreement dated 28th July, 1998. The prayer in the said notice of motion was only for stay of the suit. In any event, while permitting withdrawal of the notice of motion, this Court granted a liberty to take out appropriate proceedings at appropriate stage. Looking to the mandate of subsection 1 of section 8 of the said Act, present notice of motion taken out by the first Defendants cannot be defeated on the ground of delay or on the ground that the earlier notice of motion was withdrawn.

10. However, as stated earlier, there is no merit in the notice of motion and accordingly, notice of motion No.1379 of 2007 is dismissed. The office is directed to set down the suit in category of "Undefended Suits for Exparte Decree" on 17th September, 2007.

JUDGE